TRANSCRIPT OF HEARING BEFORE THE UNITED STATES SENTENCING COMMISSION ON THE DEFINITION OF "LOSS" IN THE THEFT AND FRAUD SENTENCING GUIDELINES

OCTOBER 15, 1997

Commissioners

Chairman Richard P. Conaboy
Vice-Chairman Michael S. Gelacak
Commissioner Michael Goldsmith
Commissioner Deanell R. Tacha
Commissioner Mary F. Harkenrider, *ex officio*

Witnesses

Honorable Gerald E. Rosen
U.S. District Court for the Eastern District of Michigan
Member, Committee on Criminal Law of the Judicial Conference of the United States

James E. Felman, Esq.
Kynes, Markman & Felman, Tampa, Florida
Member, Practitioners Advisory Group to the U.S. Sentencing Commission

Mr. Gregory A. Hunt
Sentencing Guidelines Specialist, U.S. Probation Office for the District of Columbia
Member, Probation Officers Advisory Group to the U.S. Sentencing Commission

Frank O. Bowman III
Visiting Professor of Law, Gonzaga University School of Law, Spokane, Washington

[There are two short gaps in the testimony, on pages 13 and 28, during which the audiotape was changed.]

Conaboy: It looks like we are ready to begin, and I want to open this public hearing today by thanking the panelists who have agreed to come here today and try to enlighten us on some of the problems that we have in this rather bedeviling area of definitions of loss and matters that have to do with fraud and theft, things we are struggling with to try to make clearer and easier understood and easier to use in the guidelines. It's—the concept—we had a hearing similar to this a few weeks ago and it's a concept we are trying to foster a little more to open up our process here as we are sometimes asked to do, to allow for more input from the public and others interested in the sentencing system in the United States, and to make some of our own information more available to everyone, and to give all of you who are interested a chance to

work with us and to give us your input. Parenthetically, today we're also taking another small step to make more of our own information available to everyone this afternoon. I understand some of them are already here today. Some copies of materials that we use in our own working sessions—people have asked us about working sessions and what we do and what we discuss there, so we are trying to make some of those materials more available, again, to open up our processes in an orderly fashion and still allow us to try to do the work we have to do and to work together as Commissioners. So we will be making some of the material that actually goes to each of the Commissioners and outlines matters which we talk about in our working sessions. Some of you might find that interesting on similar topics. And today's hearing, as I said, is another step that we're taking in opening up our processes to make what we do more available to the public and also to give everyone a chance to give us more extensive input.

We are going to be talking today, as everyone knows, on these issues of—surrounding this area of—loss and what it means as far as someone having been charged with criminal conduct that results in loss to someone else, how that impacts on the culpability of that defendant, and more importantly how it impacts on the sentence to be imposed in a given case, whether loss itself is an appropriate and only method of defining and determining the culpability or the harm that is done in a given case. These are all matters of great importance to the system, and we're struggling to try to—in those areas of fraud and theft and tax areas particularly—see if we can simplify that concept in a way that it might even apply to all of those areas generally, and then allowing for some responsibility in the individual sentencing courts to apply those definitions so that the true conduct and the true harm that a defendant may have caused will actually be considered by the court in imposing sentences.

These kinds of cases, as we all know, are very, very fact-specific cases, and the conglomeration of facts that make up each case often makes that case a bit different than what we might think of as a heartland case or a general case. And of course, that's the essence of the guidelines system: to try to define, if we can, those cases that are generally the run-of-the-mill or the normal or the heartland type of case and also to allow a process whereby cases that fall out of that heartland can be handled in a way that the sentence imposed reflects, in large measure, an acknowledgment of what the actual conduct and actual harm was that was caused in a given case.

We have four people here with us this morning, and I thank each of you personally for coming and sharing your insights with us. So we might know that we sent to each of you a letter and a format about the problems that we're facing and asking you to make some comments on them. Let me first introduce our panel members: Greg Hunt, on my left here. Gregory Hunt is the Chairman of the Probation Officers Advisory Group to the Sentencing Commission. Gregory is a senior probation officer and a guidelines specialist. That's a term I really admire, Gregory—anybody that has the courage to accept that appellation is . . . . He is here in the District of Columbia with the Probation Office here. He's been a probation officer for eighteen years and has been over here, testified before us on a number of occasions and through their group, especially, has considerably put into what we do.

Jim Felman is sitting next to Gregory Hunt. James is a partner at Kynes, Markman & Felman in Tampa, Florida. (One would be smarter to be in Florida today with this weather.) Jim is appearing today on behalf of the Practitioners Advisory Group—again, another group that we look to for help and receive a lot of guidance from. Jim has been active in the Federal Bar Association and serves as the program moderator for an annual seminar on sentencing guidelines, which in the past several years has been co-sponsored with the Sentencing Commission.

Next to Jim Felman is Judge Gerald Rosen. Judge Rosen is a District Court Judge for the Eastern District of Michigan, appearing today on behalf of the Judicial Conference's Committee on Criminal Law and particularly the chairman of its Subcommittee on Sentencing Guidelines, Judge Gilbert, who couldn't be with us today. Judge Rosen is also a member of the Michigan Criminal Justice Commission and the President's Commission for the Preservation of America's Heritage Abroad.

And finally, on my far right is Frank Bowman. Frank is presently a professor of law at Gonzaga University School of Law. He served as an Assistant U.S. Attorney in the Southern District of Florida and was in private practice in Colorado, and during 1995 and 1996 he was here with us on special detail from the U.S. Attorney's Office as Special Counsel with us here at the Commission. Frank has published a number of articles on topics regarding fraud and theft and the guidelines themselves. I understand that your article on loss has been accepted for publication in Vanderbilt Law Review. So maybe that's all we'll have to read is that, and we can resolve the whole thing.

So we are happy to have you here today. We have given three broad categories of concerns. The first is why should the Commission consider tackling this whole definition problem, the definition of loss. Second is would some or all or some of the problems with loss be best addressed through a comprehensive, simplified definition of loss, coupled with the elimination of much of the commentary that we have in the guidelines now which sometimes is hard to follow. And third is the area of some specific loss problems, like actual loss and interest and consequential damages and gain and those items that get involved at times when the definition of loss doesn't seem to actually capture the total harm that is done.

What I am going to ask you to do—and I think you have been informed of this in advance—is that you would make some opening statements, about five minutes or so on this whole—the first area of why should we tackle the definition itself. I'll ask you to comment on that. And then I will see if there are questions from the Commission or comments on that particular subject, and then we'll move to the second and the third. John Kramer is going to help me with timing here, so I will try to be a referee and push the buzzer. We don't have the three lights like they do over at the Senate. We'll try to move this along, then, and make it as broad as we can. I think it might be easiest if we start and go left to right on all our presentations. Gregory, that would have you—by the way, we've had—and thank all of you for your written submissions. We have had those and we've distributed them to the Commissioners and others, and we've had an opportunity to read those and we'll be able to use those more fully. Gregory,

would you proceed first on that issue?

Hunt: Thank you. The Probation Officers Advisory Group thanks Judge Conaboy and the Sentencing Commission for allowing me to testify today in regard to possible modifications in the sentencing guidelines concerning loss issues. The probation officers throughout the country believe that the loss issue is a very complex and contentious issue, and resolving issues surrounding loss have to be approached with great trepidation, as changes will have a dramatic impact on the courts and the defendants being sentenced. It is for this reason that probation officers believe that any changes in the definition of loss should be directed toward simplification and more clearly defining the terms used in application notes. Any changes that would result in greater complexity of the guidelines are opposed by probation officers for fear of greater misinterpretation and disparity in their application. We firmly believe that unusual circumstances should not be addressed by the guidelines, except to enunciate that such circumstances should be resolved through departures. It is with these thoughts in mind that the Probation Officers Advisory Group responds to the Commission's request for our input in regard to problems associated with loss.

First, in our recent meeting, probation officers did not raise the issue of loss as one of their principal concerns. On the other hand, during discussions they expressed some concern about the complexity of determining loss in some cases and the disparity that occurs through different interpretation of the guidelines commentary. Of greater concern to probation officers was fact-bargaining for fraud cases. Probation officers described numerous circumstances in which facts were stipulated to by the defendant and government when in actuality the losses were greater than the stipulation. The results of such stipulations were to circumvent the harsher sentencing that the guidelines required. Probation officers acknowledge that such stipulations are often the result of government's avoidance of pursuing a complex and expensive trial. On the other hand, such stipulations often handcuff the court and the probation officer and belie the guidelines. However, the probation officers understand that the limited ability of the Sentencing Commission has to effectuate any change in regard to the plea bargaining process. This is an issue that might be pursued with the Department of Justice.

In regard to proposed modification of loss tables, probation officers were quite effusive about the streamlining and increased severity of the loss table and they wholeheartedly support its adoption. Most probation officers believe the guidelines are too low for white collar offenders. In addition, more-than-minimal planning is an issue that is often disputed, but appears in every case where there is substantial fraud. However, probation officers also believe that the Commission could also consider simplification of the definition of loss at the same time. Although the probation officers believe that changing the two at the same would be beneficial, the officers acknowledge that modifying both at the same time may be impractical. Therefore, they support the adoption of the proposed table. They also recommend that the current table be maintained in the guidelines for other guidelines that refer to the loss table. Adopting the new table for recurring guidelines may increase sentences for offenses that do not need increasing, such as bribery.

Second, probation officers were unified in their opinion that unusual cases should be addressed through departures. So often, unusual cases are the ones that cause litigation on a disputed issue. However, the sentencing guidelines can not possibly address all of them, and such decisions should be left to the district court.

Conaboy: Thank you, Greg. Jim, would you proceed next, please.

Felman: Thank you, Mr. Chairman. On behalf of the Practitioners Advisory Group I also would like to express our appreciation as a group for the opportunity to participate in this hearing, and for the fact that you called the hearing at all, particularly at the pre-publication stage of the process. We really hope that this will help you all to focus on some of these issues and move the ball forward on it. We think it's an important issue, and one of the reasons that I would stress why this may be some of the most important work that you all do at the Sentencing Commission is to point out the absence of any mandatory minimums in this area.

In drug cases, you are often constrained by what Congress has sent you and left you with. These economic crime cases are some of the most publicized, they are some of the most significant, they are some of the most *important* cases that are brought in federal criminal cases, in the federal courts. And the punishment for these cases is totally left up to you all, and I think it is the best opportunity for this Commission to demonstrate that guideline sentencing can work, that it can be fair, and that it can be a rational system. And I think that the current guidelines are an excellent step in that direction, but we also think that there is a need for improvement here. What we want to stress is that we really feel this is an important area for this Commission to show how guidelines can work. These are important cases, and you are not constrained in any way from getting the right result.

Secondly, we acknowledge that they are difficult issues. I think that—maybe this is just because this is the kind of work I do—it seems like the kind of fact scenarios are much more diverse in the kind of cases that fall within the economic crime statute, whether it may be fraud or theft, than guns and drugs and bank robberies and other sorts of things, where I think the cases maybe are more similar to one another and easier to perceive what the issues are. I think these are difficult issues, just because the facts can be varied and still fall within these statutes.

However, we really don't think that issues are insurmountable. We approach them with two basic theories in mind. First, we agree that loss is the best starting point to determine the severity of the offense. We don't think it is the only way to measure the severity of the offense and the offender's culpability. We just can't improve on it any. You have to start some place and we think that is the best place to start; we agree with that basic proposition. But we think that perhaps there has been too much attention paid to trying to identify with mathematical precision exactly what the loss was, in a way that kind of loses sight of what the purpose of measuring loss is. The reason we are measuring loss is just to try to get some rough approximation of how serious this crime is, and roughly what range on the sentencing table this defendant ought to be put within. And we really feel that it isn't worth the extra effort anywhere you're going to add in

things that are going to require extensive litigation and complexity and interpretation over things that aren't really going to change the amounts that much. We think it strays from the mission of looking at loss to start with, which is basically to get a rough starting point of how serious this offense is. And that general theory is what we carry through in applying to the various specific issues which you have asked us to look at.

Now, I want to also stress that this is not an issue—or we hope that it can be looked as an issue that does not relate to offense severity. We hope that we can look at the definitional issues not in a political context. To be blunt about it as a defense lawyer, you are going to see me arguing, "Don't count that, don't count that," and the government is going to be saying, "Oh, well, you need to count that, and you need to count this." And our hope is, quite frankly, that if you postpone consideration of the tables, so that you look at them at the same time, any issues about how serious the result in punishment is going to be once you've figured out what you are going to put in and take out can be addressed when you look at the tables.

I understand that this is not going to be a unanimous position of this panel. But our concern, as a realistic matter, is that if you set the tables, then any discussion of what is in and what is out is going to be about politics, it's going to be about whether its offense severity is up or down. And we really think it doesn't need to be that way. What we're hoping to engage in on the definitional issue is a frankly objective (we hope) effort to decide what's fair, what ought to be counted, and what should not be counted, and what is in keeping with our first principle of basic simplicity. And then once you've reached the decision about what you're going to include and what you're not going to include, then you can look at the tables and say, "Okay, now where does this leave us, in terms of are the punishments where do we want them to be?" That's why we urge you all to consider the tables with the definitional issues at the same time. I have gotten the one minute warning, and I'll call it at that.

Conaboy: Thanks very much, Jim. Judge Rosen, can we ask you to go next, please.

Rosen: Thank you, Chairman Conaboy. I just said it's the first time I've been on the other side of the bench with so many judges, and it brings back not so fond memories.

Conaboy: Well, we rarely exercise contempt power. We're glad to have you here.

Rosen: I'd like to thank the Commission for inviting the Criminal Law Committee to come and express our views on what is really a very important issue, and that is the loss and more specifically the tables and the definitions of loss. As you indicated, Mr. Chairman, I'm sort of pinch-hitting here today for Judge Gilbert, who couldn't be here. And Judge Gilbert has, I believe, submitted a statement which I think will be part of the record. I'm not simply going to—rather than simply repeat what's in Judge Gilbert's statement, let me try to summarize or capsulize what Judge Gilbert has said and what I think the consensus is on our Committee. Taking sort of the last issue first, in proving Jim to be a prophet, there is *not* unanimity on the issue, amongst the four of us, on the issue of whether the tables should be done separately or

together with the definitional issues. I think that it's fair to say that the Committee is unanimous and feels very strongly that the tables should be done first.

There are a number of reasons for this. First of all, it seems to me that to do the definitions first and then the table is putting the cart before the horse. Putting it in football terms, you need a playing field—since this is the season—you need a playing field before you can have a playbook. And it seems to me that the tables provide the parameters against which the definitions are adopted. It's always beneficial to know what the measuring stick is first, before we begin to take measurements. I think it's very important that we have this stationary back drop developed first of the tables before we move on to the definitional issues.

Perhaps, just as importantly, as a pragmatic issue, I would hate to see us lose the progress that we have made on the development of the tables under your able leadership, Judge Conaboy. I think I was here back in the spring—we had a hearing at the time involving the defense bar and involving a number of other interested constituent groups. The Commission voted on the issue, it was a close vote, and since then I think there has been progress in coming together on the tables, and I would hate to see us, as a *practical* matter, lose the momentum. Because all of us know that in the real world of politics, once you step back from the point at which you are about to kind of put the ball over the goal line, it becomes harder to start over again, particularly if you mix it up with some of the very difficult issues that both Greg and Jim have alluded to, and I am sure Frank is going to allude to, of the issues of definition. I think it will be very, very difficult if you step back from the progress that was made to try to then put the debate on the tables in the context of the definitions. The issues in my mind, as a judge, are completely separate. I hate to see us lose—as I said—I hate to see us lose the momentum and the progress that we've made under the Commission's leadership so far. I think it's doable to go forward now and that we should do that.

Let me now turn quickly to the issue of loss and the definition and, stepping back again and looking at the big picture, what is really at issue here is whether or not in the area of loss we want to serve the statutory objective that established the guidelines in the first place. The purpose of establishing guidelines and establishing the Commission and establishing a regime of sentencing was to promote uniformity and to reduce disparity. We tried very hard in other areas to do that by regulating in the smallest detail definitional aspects of a crime. For example in the drug area, to measure right down to the tiniest gram. And we sentence according to quantity and that's the value that we use. In the gun area, in the area of gun sentencing, we do the same thing. It seems to me that when we're talking about loss, we are talking approximately 20% of all of the crimes that are prosecuted and sentenced in our system.

And to have a definition which is very vague and sort of amorphous and to simply throw it open to the judges and say, "Well, y'know, this is a Rorschach test, and you tell us what you see in it and that will be the sentence," and hope that the courts of appeals first of all use the same standard, an abuse of discretion standard rather than a de novo standard—and I think in practice that varies from circuit to circuit and even from panel to panel within the circuits—is simply an

invitation to promote disparity and to reduce uniformity. So when we look at the current system, I think we have to make to determination as to whether or not we want to do in the loss area what we've done in other areas, which is to promote uniformity. The problem is here the core definition is squishy, it's larceny-based, and it doesn't work well outside of pure theft. It doesn't work very well in the fraud area, and I think that the Committee would like to see a little more definition given. I see that my time is up and I would be happy to answer any questions.

Conaboy: Thanks, Judge. Professor, can we hear from you next, please?

Bowman: Thank you, Judge. Thank you for inviting me. I am very, very honored, and I appreciate it since I don't represent anybody in particular.

Rosen: You represent the professors, don't you?

Bowman: Yeah, I represent the mushy, pointy-headed, intellectual faction.

Gelacak: What does he mean by that, Michael?

Goldsmith: Speak for yourself.

Bowman: Actually, I was thinking of you. (He'll get me for that.)

Goldsmith: I'll keep that firmly in mind.

Bowman: A couple of things. . . . Let me start out by saying that one of the advantages of being a pointy-headed intellectual is that, at least hopefully, you can aspire to some political neutrality, although that's of course not always possible. To that extent, I think I agree with the statement that this is—or at least should be—an area where the Commission can act, can act in a meaningful and important way, and can do so in a way which, except at the margins, is fundamentally politically neutral. The problem that you have here, the problem with loss, is a problem of definition. It is a problem of legal engineering. It is not a problem of ideology. And I think that significant simplification can be achieved, a great help to the judges, a great help to the parties, without doing anything that is materially politically controversial or undoable. I think that distinguishes this area from many of the other problems that you must necessarily face in the difficult job that you have. This is not the crack problem. This is a problem where you can apply your expertise and your good judgment to do something for the system and not have it turn back in your faces because it doesn't happen to comport with the prevailing political winds. And I think that's tremendously important.

The question then, I guess, is why you should do that. Assuming that one *can* act, and do so in a relatively politically neutral way, why should you do that in this particular case? Let me turn to that very briefly. Before I do that, I want to make a correction. There's a mistake in my written statement on page seven. I say there that Professor Higgins in *My Fair Lady* said that this

is "a ghastly mess." In fact, it's not Professor Higgins. It is actually George Banks in *Mary Poppins*. I had the song in my head when I wrote this, and after I came in I said, "You know, it's the wrong musical!" But the point remains, regardless of who said it, in which musical, that the loss definition is still a ghastly mess. And it's a ghastly mess for a number of reasons.

The first reason is that there is no earthly reason whatsoever to have separate theft and fraud guidelines, essentially because theft and fraud are analytically almost indistinguishable categories, both in state law and federal law. Second of all, if you are going to have separate guidelines for theft and fraud, you ought to do so for a reason. You ought to do so because you want different outcomes. The truth is, if you run the facts in almost every theft and fraud case through both guidelines, you produce virtually identical outcomes. And there is therefore no reason to have two of them. The third reason is that the two guidelines are, although they are almost exactly the same, they are not quite exactly the same, they are slightly different. And because they are slightly different, ingenious judges and lawyers have struggled to import some meaning into that difference. And sometimes they're successful and sometimes they're not. But the result is almost inevitably confusion. And I cite in my statement and in a longer article on which it is based a series of cases out of the Third Circuit that I think illustrate that point very, very nicely.

The second problem is that even if you are going to consolidate theft and fraud sentences, you have a sentencing scheme which is based primarily on a term, "loss," for which there is simply now no coherent definition. It's not that it's even a squishy definition, it's not just—it's simply incoherent. It can't be understood in any logical way. And I wasn't clear on that until I spent months and months of studying this and trying to figure out what it meant. And at the end of the day I came to the conclusion that you can't really understand what it means. It has no meaning.

The primary definition, "the value of the property taken, damaged or destroyed," as someone here has already mentioned, is larceny-based. The key word in it is the word "taken," to which to any Anglo-American lawyer connotes the "asportation" part of larceny law. Well, that's very nice if you happen to have a simple theft crime, but as you know very few federal crimes that have been prosecuted and for which there is a problem are—that definition, that concept of "taking," is of almost no use in fraud. Therefore, judges are left to try to apply this larceny-based thing to a set of facts to which it has no application. And then they are thrown into a series of other calculations which are also not much help.

The primary thing that I would like to see, as is clear from my written presentation, I would like to see loss redefined in the terms judges use either expressly or impliedly anyway. That is the idea of causation. When you—when we ask the question "what loss should count?" what we are essentially asking is two questions. We're asking, first of all, did the defendant's act—or was the defendant's act a necessary precursor or a logical precursor for the harm that we want to consider including? And, second of all, if it was a necessary antecedent, if it was a cause in fact, should we count it? And that's a question that recurs throughout the law: civil law, criminal law, contract law, tort law. It doesn't matter where you look. If you are trying to decide

whether or not a defendant should be held responsible for harm, you will analyze it in that way. We've always done it that way. Anglo-American judges have done it that way for seven or eight hundred years, and in fact I think that's what judges do now even though the definitions that we've given them over the years don't really speak in those terms. My suggestion is that you give the judges the tools that they are using to some extent anyway, let them apply them consistently, and I think you will allow them to produce consistent results. Let me just close for now.

Conaboy: Thank you all very much for your comments. Maybe I might start some of the discussion here since we may be able to take some questions on this area that you've talked about and then we will try to move, when I understand our time causes us to do that, to the next section.

Frank, let me ask you something—to comment, if you would, on something that I think Judge Rosen at least may have been referring to, and that is a problem that judges sometimes either complain about or wish they had more of, and that's what's sometimes called discretion. I like to call it responsibility, because discretion has become almost a bad word. So I've been referring the last year or so, as I go around the country talking to judges and others, about the court, the sentencing courts taking on even more responsibility under the guidelines. And they feel it is their responsibility to look at and to be careful every time there is a sentencing matter before them, to make sure that the application of the guidelines is correct and that—especially if they feel that the case is somewhat unusual—that they look and explore with counsel and with the probation office every potential avenue for doing something different than the heartland case.

That takes work. It takes a lot of time. And sometimes I am afraid in our country we got used to handling sentencing in a rather quick and fast fashion, and it's not something that judges like to do as much as being involved in an interesting civil case. So with that little background in mind, I wonder if you might address for a minute what—the idea that if we had a generic definition of loss, a simple one, a straightforward one, wouldn't that allow judges in exercising their duty in the case to sometimes do a lot of things that are different and maybe end up in more disparity than we'd like to see?

Bowman: Let me answer that in two ways. First of all, I think that uniformity, desirable uniformity, would be promoted by producing a coherent, usable core definition. In my view, again, that core definition should be based on the concepts of cause in fact and foreseeability. Because, as I said, I think that's what judges do anyway, whether they recognize it or not. And sometimes we explicitly tell them they have to. So I think that a redefinition of loss away from its current, essentially unusable form, in the direction of something which makes sense, which is consistent with the guidelines' principles and which is consistent with the way judges and lawyers think about these problems would be a tremendous advance and would promote uniformity and not disparity.

The second half of that, I think, is that I do not believe you can stop there. The reason I don't think that you can stop there is that even if you define loss in a coherent way, a couple of

well crafted sentences, that gives you a core notion that works, there are still a number of subsidiary problems which remain to be solved which I think inevitably you will want to solve once you start thinking about . . . let me give you a couple of examples. First question, once you define the loss, who are the victims? I think you are going to want to say something about that. Next question—

Tacha: Well, let me stop you right there. Why? Why would you look to the victims? If your definition is one of cause in fact and foreseeability, then aren't you looking to the culpability of the defendant and not to the victim side? That is to say, this is my take on this and may not be correct, but I think some of the confusion has resulted from judges and lawyers—maybe purposely or not—are confusing the notion of making the victim whole with using loss as a proxy for culpability.

Bowman: Well, I think there's two answers for that, Judge. The first thing is, I think that loss is principally, although not entirely, a measurement of harm. When we assign criminal culpability and then when we sentence people, one of the primary components of course is the harm that is actually done. Another component is of course the culpability, the blameworthiness of the defendant. Loss, as we use it here, functions directly as a measurement of harm, and to a certain extent as a proxy measurement for blameworthiness, and that's where we've always used it. But I think it's primarily a measurement of harm. And thus, if it's a measurement of harm, the question is to whom? If you're going to decide the extent of the harm, you have to say something about who the harm is inflicted upon. And the guidelines at present don't tell us that. And you have to answer that question before you can completely measure harm—the question is, "Who is harmed?"

Tacha: But why isn't that captured in foreseeability?

Bowman: Well, I guess my answer is that, in large measure, it can be. I think you can say, that the victims—you can solve the problem through foreseeability. You can say the victims are those persons to whom a foreseeable harm occurs. So I think that you can do that, but I think you need to make that slightly more specific. I think there's a series of other subsidiary problems that you're going to need to address in addition to who's the victim. The next one is time of measurement of loss. If you don't tell the sentencing judge when the loss measurement is to occur, you are going to get different measurements. A simple example that I have used in the past is—let's assume you have a situation where somebody steals my car. If I measure the loss at the moment that it's stolen, that it disappears, that the crime is complete, the loss is presumably the value of the car. You measure it at sentencing, as some courts do under some circumstances, and the car has then been recovered, well, my loss now is not the value of the car anymore. The loss is now zero. If you measure it at the time of discovery, it may be something different. Now I am not, at this point—right now I am not plumping or advocating any particular point. What I am saying is you have to tell the court when to measure.

Similarly, interest is a big issue. Again, at this point, I'm not taking any particular position

one way or the other about whether or not we should or should not include interest or what kinds of interest you should include, whether you should include bargained-for interest, or you should include opportunity-cost interest or anything. But the point is that that is an issue which is constantly being debated by the courts of appeals, and I think we need to give them direction on that point. Also, issues of measurement: is the measurement to be fair market value? Is it to be something else? Is it to be net or gross, if it is going to be loss? Those are questions which I think, once you have a core definition, the answers to all the subsidiary questions I think are fairly derivable from the original core definition, but they are not free of debate. I think that reasonable people, including reasonable appellate court judges and reasonable district court judges, even if you have a great core definition, are very likely to arrive at different definitions depending on the subtleties of the cases in front of them.

And that means that as to all of those secondary but nonetheless tremendously important questions, if you stop with the core definition what you will have is more disparity. As I said in my opening statement, I have counted right now eleven analytically distinct circuit splits on what loss means right now. And give me fifteen minutes, I can punch out a dozen more. It's that disparate right now out there in the court of appeals. If you do not—even with a good core definition, if you simply then throw into the lap of the court of appeals all these subsidiary questions (time, interest, all the other issues that we will probably be talking about in more detail today), the result will be even more disparity than you have now and a good deal more confusion. I think—my bottom line is this is a soluble problem. I suspect that one of the concerns that you have is this is awfully complex when you look at it from the front end. Is this is a soluble problem? I think it is soluble. Once you get a good core definition, then you think through the rest of the problems and you've got it solved. But you have to do both things.

Conaboy: Any other questions? Any other comments?

Goldsmith: Yes, I have a question. Can you give me an example of a situation in which, once you have a good core definition that solves some of these subsidiary issues that you mentioned—

Bowman: Well, I mean, I think—

Goldsmith: Let me give you an example of a situation in which I think it doesn't. If your core definition focuses, as you say, on causation and foreseeability, how does that resolve the question of whether to use net versus gross?

Rosen: I'm getting a deja vu of being back in law school here.

Bowman: That's what I do for a living, you know.

Rosen: Let me give you a hypothetical.

Bowman: I think it is actually—it actually works out quite nicely. Once you've defined your loss as I think you should, in terms of cause in fact and foreseeability, essentially, again, what you're measuring here is harm. You're measuring harm to the victim. And therefore, I think inevitably, what that means is that you have—that the loss should be in general terms the net loss. And you have to subtract out those things which are given to the victim, for example, in return for whatever is taken from him or her. That flows from both the basic notion that this is harm that we're measuring and the basic idea that we're trying to examine the causal relationship between the defendant's conduct and what happens to the victim.

Conaboy: Let me give the judge here—do you want to comment? We're really a little bit over time on this one, but I want to . . .

Rosen: Well, I guess the point I'd like to make is that focusing on harm is fine, depending on how you define harm. There is an entity that is harmed even when you have an inchoate crime which is not completed, or a crime in which, to use Frank's example, where the car is returned and there is no actual "loss." And that harm is the harm to society. That's a harm that has to be recognized in the guidelines. We don't want people stealing cars. We don't want people blowing up buildings. If they put a bomb under the building, and the cops happen to get there and defuse the bomb before the building was blown up, we still want to punish the person who was going to bomb the building. The fact that the crime didn't succeed completely is maybe a mitigating factor to look at, but it shouldn't be the principal sentencing factor. In the area of economic crime, when you're focusing on harm, yes, we look at harm to the victim, but we also want to keep very much in mind that our job as judges is to punish and also to create a deterrent, and if you don't punish people for stealing money, even if it's—even if the crime is not realized, or even if they've given some of that money back to people in order to perpetuate the crime further, such as in a Ponzi scheme, you're sending the wrong message.

Conaboy: All right, can I—

Bowman: Judge, just quickly, I don't think there is any real disagreement between Judge Rosen and myself on this point. For example, I think very clearly that we can't define loss purely in terms of actual loss. I think, for example, the intended loss must remain as a component of this definition, because there are inchoate crimes. We have intended loss because there are inchoate crimes or crimes which are only partially completed and there must be some way of distinguishing between more and less severe uncompleted criminality. And the way we do that now . . . [gap in recording] . . . operations, but there is no question here, in my view, that you have to maintain intended loss. But when you are trying to determine what the actual loss is, what the actual harm suffered by the victim is, I am not saying anything different than anything the guidelines currently say—where you say, for example, that if someone commits a fraud by giving somebody something that is less than it is represented to be, then you subtract from the loss the value that is given to the victim. That's all I'm saying.

Conaboy: Let me ask if we can—I think we've moved along, actually, into the second

area. The second area we are going to talk about is a question posed this way: would all or some of the problems with loss be best addressed through a more comprehensive, simplified definition of loss, coupled with the elimination of all or some of the current commentary? And under that we have some sub-issues: what principles should be articulated or modified and what loss issues should be relegated to departures, and should the same definitions of loss be applied to theft and fraud? And we have touched on some of those. Gregory, let me go through the panel again and ask you—would you like to comment on that area, about the need for some specific, comprehensive, generic definition?

Hunt: The probation officers were pretty adamant about the fact that they thought that the definition ought to be simplified. Of course, they did not discuss what principles should be used. I can't remember a comment as to how probation officers feel about that type of thing. We are greatly concerned about the issue of definition and resolving some of these issues.

Tacha: Greg, this is more of sort of pragmatic question, or how we look at the issues here, but, as you know, our records have all these pre-sentence reports in them, and yesterday we had some discussion about whether we really know what the extent of the problems is because the pre-sentence report will only contain what the ultimate agreement was, as to the loss. Now I guess that is correct. So what it doesn't tell us is what all factors were deleted in the agreement. And you in your testimony make a point—and I think it is the correct point—about so much of this is bargained away in the loss area. What is that we should be looking at in these pre-sentence reports that would help us understand what the problems are? I guess that's the question.

Hunt: From my understanding, and I know in our district, we present the facts to the case, and what the actual facts are, and what happens is that the government has tied their hands and cannot argue for the upper loss issues that we present. I would say—and just discussing this with other probation officers—that the information *is* in the pre-sentence report.

Tacha: Well, that's what I would have thought.

Hunt: I *have* found instances where—although there have been comments in some instances from probation officers that some government attorneys have been unwilling to provide us with the information. But I would say that is a minority. I think in most cases we are able to obtain the information from the government, and we present those in the pre-sentence report. Then we go to court and the probation officer says, "Well, this is the actual—what *we* believe the actual loss is." The government can't comment, because they've already agreed to the lower amount. And so, if any evidence is going to be put forward, the probation officer would have to do it and we are not in that position. So, it's whether the judge wants to pursue it any further. Often, what I see is that the judge says, "Well, since the government can't present this information, then I will just have to accept the plea agreement stipulations."

Tacha: So, I guess, to sort of follow up on that is . . . those cases aren't a problem. Is that fair to say? Those cases where everybody agrees this is the loss?

Hunt: No, probation officers don't believe so because they think it distorts the guidelines and that brings about disparity, because what one government attorney stipulates to out in California may be totally different than what a government attorney stipulates to here. So that promotes disparity. We are greatly concerned about that issue.

Rosen: You know, it is sort of like the Italian tax system. They have laws and percentages of income that you are supposed to pay, but as I understand it in reality, the taxes are fairly much bargained. So, you know, it's not a problem because I guess everybody buys into that system. But they are not furthering the statutory objective.

Conaboy: Jim, would you want to comment on that area?

Goldsmith: Before you do, I've got a question for Greg—I'm sorry. I'm going to back up here just a moment. I thought I heard you say in your opening statement that the probation officers did not view loss as a principal area of concern. And that struck me as surprising, given that when the Commission, in conjunction with the Administrative Office, conducted a survey of judges and chief probation officers, the loss definition issue was at the top of their list of concerns. I don't recall what the number was—I think it was number two. And I'm not trying to impeach you here with prior inconsistent statement, but if you can possibly explain the inconsistency, I would appreciate it.

Hunt: I would have to say one thing is that chief probation officers don't usually do pre-sentence investigations, so they may not be totally aware of what goes on between an officer that does them and the court. The other issue that I addressed is the fact stipulations, which are of much greater concern to probation officers. I would also like to make one comment, is that I have done many, many fraud cases and other probation officers also have, and a lot of these fraud cases, we determine the loss, and it is accurate, the judge accepts it, the parties agree, and it is not a problem.

What I notice here is that there's a lot of appeals, and I understand that, but you look at the affirmation rate, that they are affirmed. And so I think that what we are really looking at, what you see, when it gets to the circuit court, are the complex issues. The ones where, probation officers believe, that's when departures come in. And that's where we think that the court should have some discretion. On the everyday, usual fraud case, we don't see that as a great—now it is sometimes when you're going through all these accounting books and determining loss—it's somewhat difficult at times. But it is not an issue that we think is the most important. In fact, the FJC—I was just given this information—the probation officers were rated (apparently in a survey in '96) and it was ninth or tenth among our issues. So, I'm, uh . . .

Goldsmith: It's a different survey, OK. So, in light of your answers, it's fair then to say that you folks do not view the definitional issue as a threshold that the Commission must address before it turns to the severity tables on fraud, theft, and tax.

Hunt: We would like to have it done at the same time because it would be simpler for us, but we are very much in favor of the change in the table.

Conaboy: Jim, I'll get back to you and I'll let you jump in here.

Felman: Well, I'll try to answer the question you were presenting to us first, I guess, which is how I feel about the idea of trying to solve these issues just with a general statement of definition, and then leaving the rest of these issues to be resolved by the courts with the idea that that would leave them a greater responsibility. I think that having a modified definition of loss from what we have now is clearly going to be a step forward. And when I get done with the rest of this answer I will tell you what we think might ought to be in that definition. But I want to stress that we think leaving it at that, and eliminating the rest of the commentary, is probably going to end up being a step backward because a lot of the issues that Professor Bowman mentioned—these issues of interest, issues of gain, frankly—our position is that loss is a good starting point, if you recall my initial comments, but it isn't the ending point. We really feel that there are occasions where gain is a significant issue as well in measuring culpability, both ways.

So we really feel like just having a generic definition of loss, it ought to be done, it would be an improvement over the current situation. But we don't see any reason to eliminate the issues that have been basically, pretty well hashed out and settled, through your current commentary. Issues like consequential damages, whatever that might mean. There are a lot of issues that have been settled, that aren't being litigated. My fear is that if you erase the commentary and you just put in a general generic definition of loss, it's going to be a kind of open season out there. We're going to start all over again, arguing every possible issue in every case, and it's going to be a lot of work. And I think you're going to end up with different results in different cases. Now that may give judges more responsibility. I think it is also going to lead to disparity.

So I couldn't say that we'd be in favor of stopping at just a generic definition. We think you ought to go on, beyond that, and try to address some of these other issues—and we think you can. We think a definition—a better definition—is readily available, however, and we think it ought to consist of some sort of explanation that loss is being used as a rough surrogate for culpability, so it need not be determined with precision, and the court need not engage in extensive fact-finding and litigation over issues if it determines it won't have a significant impact on the ultimate result.

Secondly, we think, Judge Tacha, that it ought to be a "net" approach. And this is why we feel that way: it's fairly easy to treat cases that are alike in a similar fashion. Uniformity is pretty easy to achieve. You can just give everybody ten years. What's hard is to treat different cases differently from one another. That's really, I think, where it gets tough, to figure out what makes one case different from another. And I would submit to you that if somebody takes out a loan for $1,000,000, and it is collateralized by a $900,000 development, and they use proceeds of that loan for the building of that development as intended, and they get the loan by fraud. And there is ultimately a failure of the development and default and foreclosure and the bank is able to

recover $800,000 of its collateral. That, to me, is a much different case than someone who takes out a $1,000,000 loan by fraud and pockets the money and walks out the door. I think that the avoidance of *undue* uniformity, treating different cases alike, compels a "net" approach. I think that a "net" approach is a necessary one to really accurately parse through what is the harm and what is the culpability. And it is consistent with why it is that we're using loss as a measure of culpability.

Tacha: Maybe "net" and "gross" isn't even a really good distinction, because in your hypothetical, for example, it seems to me it's what was intended. And that's captured, again, looking from this—I am not terribly, I mean, I am willing to say the victim's harm is a piece of it, but what I want to look at is the culpability of the defendant. And the intentional part of your hypothetical doesn't have to do with "net" and "gross." He intended to take a least $100,000 and actually took $200,000.

Felman: He may have intended no loss at all, though. He may have intended for the development to succeed and pay the loan back..

Tacha: Well, but then you have some reasonably foreseeable—you've got a fraud, you've got some reasonably foreseeable consequences, and you've got intention.

Felman: I understand the point. I can't sit here and say today that I am prepared to say that just taking care of it from the standpoint of looking at intended loss is necessarily going to answer all your "net" versus "gross" issues. I don't think it will.

Tacha: I guess the point is, we've kind of gotten ourselves into this debate about "net," "gross"—a whole lot of issues in this—that may not actually bear much relationship to what we are trying to look at here.

Felman: Well, I think that they do from the standpoint that the bottom line here is we want to try to look at what is the severity of the defendant's conduct.

Tacha: Right.

Felman: And I think that intended loss is an important component of that. I think there are going to be some factual situations where we are going to have to confront the "net"—

Tacha: Well, that's where I think Greg and I, at least, would say we can't get every situation captured. What we want to do is direct the judge's attention in the direction of—and I would say—the defendant's culpability.

Conaboy: Did you have a couple other items you said should be included?

Felman: I got through the idea that it would be a rough surrogate. The second

component is, we think, that it needs to have a "net" component. And finally we agree with the idea that you have to include some element of proximate cause or foreseeability, which is currently lacking. That's not as simple an issue as I would hope that it would be, however, because you have what in the guidelines are described as consequential damages, which by definition are foreseeable. But they are nevertheless currently excluded for the majority of cases, except for government procurement cases and product substitution cases. So I will tell you that, if you eliminate—if you now—proximate cause or foreseeability will be a limitation in some cases. But in many other cases, you are talking about opening up entirely new areas of loss not now being included, because they are foreseeable but they might be otherwise considered consequential. So, I will tell you that my belief, as a practitioner, is that if you eliminate this distinction between consequential damages and get rid of that and just say all foreseeable harms are included, it would dramatically increase the calculation of loss. And it is a compelling reason, in my mind, why you don't want to do your tables now and then dramatically increase what gets included later. Because I think you are going to see that that is going to be a double whammy on severity.

Conaboy: Professor, you had something, and then Judge Rosen.

Bowman: There were a couple of things I wanted to mention. One of them is to back up to a concern that I think perhaps was underlying some comments by Judge Tacha. And that is the notion that because an awful lot of these cases seem—they get worked out, they get decided, people make up their minds on some kind of rough approximation of what the loss is going to be, and judges make decisions in contested hearings, decisions get made, and therefore that's some indication that we don't have a problem. I guess my response to that would be that you could write the definition of loss in Urdu, and the judges still have to make up their minds. The parties still have to come to a resolution. Judge Rosen has no option, even if the instructions we give him are fundamentally incomprehensible. He has no option to say, "I can't decide." He has to make a choice. And it has to be done every time one of these cases comes in. So the mere fact that judges decide the issues and the parties come to some agreement is no necessary indication that the system works, because we have a system in which judges have no choice but to decide. And so I think it is at least dangerous to conclude from the fact that somehow or other we muddle through, to conclude that this works.

Tacha: I think we've got enough comment from enough people that we've got a problem that we believe in. I don't think that's it. One of the things we do see, though, is like yesterday we heard that we all had 167 appeals. You were talking about the hard ones get appealed. A hundred sixty-seven appeals—was that last year or something—decided on appeal last year. Now, it is not directly correlated, but there were some 9,000 fraud cases last year. So it's not that we aren't convinced that there's a problem. You all anecdotally convinced us. The numbers don't show it.

Conaboy: Judge Rosen?

Rosen: Actually I think first Commissioner Harkenrider is trying to get a question in.

Conaboy: Oh, I'm sorry, Mary.

Harkenrider: Actually, I wanted to ask Jim Felman a question.

Rosen: So I'll cede first and then go.

Harkenrider: It's a very minor question, but you suggested that there's loss presently included that you do not believe is foreseeable, and I was wondering, just if you could . . .

Felman: I may have misspoke. No, what I am saying is that if you come up with a new rule that says that all foreseeable loss is included, you will be including loss that is not now included, which might be something akin to what's called consequential damages. By definition, consequential damages, whatever they are—we know that they are foreseeable. They are proximately caused by the defendant's conduct. But under your current guidelines, consequential damages—again, whatever that term means and whether it is appropriate or not—are included only in a small category of cases. So my point is that if you eliminate this consequential damages/direct distinction, and just say all proximately caused, foreseeable harms are included, in a great majority of the cases I think you would be *increasing* the harms that would be included.

Harkenrider: No, I understood that half of it. I thought you had also said there were some cases where you didn't believe *now* foreseeability was necessary.

Felman: I think that it is *not* an element now. I think right now there's—

Harkenrider: And what types of loss do you think is included that is not foreseeable right now, is really my question.

Felman: It's a good question, and I don't have a hypothetical off the top of my head. My only observation would be to say my understanding of the guidelines, the way they are currently written, is that there is no requirement of foreseeability per se. It is just a "but-for" causation standard. So you look at all the loss, and there isn't any requirement that the court require to determine whether or not it was reasonably foreseeable.

Conaboy: Let me get back to Judge Rosen here a minute, and I will come back to you.

Rosen: Several points here, and I think I speak on behalf of the Committee on these points. First of all—it may be even all the panelists, because, having the advantage now of speaking last, I think the one consistent thing that we heard from all of us is that the core definition needs to be redone. However you do it, it needs to be redone. I think the focus ought—your focus, I respectfully suggest—should be not on whether we redo it, but on *how* we redo it. Secondly, I think the members of the Criminal Law Committee feel that there should be

one definition of loss for both fraud and theft and embezzlement. The minor differences that arise in the nature of the crimes don't justify a different definition. Those can be worked out on mitigation factors.

Thirdly, we believe that any definition ought to include the notions of causation, foreseeability, and harm, but harm has to be more broadly defined than simply what the victim's actual—the result as it actually impacts the victim. I think that Judge Tacha makes a very, very good point, and that is that, yeah, you can say that there wasn't really as much harm in your hypothetical loan case, because—or in Jim Felman's hypothetical loan case—because it was only a $200,000 loss. But really, if you step back and think about it, the real harm and the true nature of the defendant's culpability is in the harm to society of encouraging people, or having a system which implicitly encourages people, to defraud banks. It's only fortuitous that there was only a $200,000 loss. The nature of the harm itself is a harm to society, and as a sentencing commission, I think, you've got to keep your eye on the ball. The sentencers, all of us, as judges, as the commission—you've got to keep your eye on the ball. And the ball is what is the harm to society. Not just how was the individual harmed in this specific instance. And I think all of us on this Committee want to keep that very much in focus in any definition.

Finally, with respect to some of the other issues that have been raised, such as gain, and interest, and intent, and those sorts of things, the judges on the Committee, I think, would like to see more guidance, more definitional guidance from the Commission on those issues. I think that those can be defined, I think they can be worked out. Personally, I do not have a problem with application notes. I kind of like application notes and find that—I know that not all of my colleagues agree with it—it gives you a sense of where the Commission is. And if you are going to have a sentencing regime that is regulation-based, those sorts of commentary and application notes are helpful. So as you kind of work down through the priority system, to recap, I would say set your loss tables first, then go to your definition, and then some of the sub-issues that Frank talked about can be worked out with definitions, and some of them may end up being mitigating factors one way or another. The fact that only $200,000 was lost in a loan fraud scheme is something I would take into account in determining where the sentence in the guideline range—or maybe even to drop down a level or so.

Tacha: But it wouldn't go into your definition.

Rosen: It would not go into my core definition.

Tacha: Well, let me push your core definition, because part of our problem here is trying to get a philosophical, if you will, stance about what the purpose of the loss calculation is.

Rosen: It's always hard to go from philosophy to applicability.

Tacha: Well, let's go straight to interest, for example. Take your harm to society, look at the defendant, victims are a piece of it, but not—but how would you come down on interest?

Conaboy: Come down on what?

Tacha: Interest.

Rosen: You mean the terms of opportunity lost for valuation—

Tacha: Yeah, because if you take the stance that I think I hear you taking, then interest is sort of irrelevant, isn't it?

Rosen: Not really, not necessarily, because there is an opportunity lost to the bank in the loan fraud scheme.

Tacha: But then you are looking at the victim, and not at the culpability of the defendant.

Rosen: But I'm looking at the victim only as a reflection of society. The opportunity that is lost is the opportunity the bank would have to make loans to other people who were law-abiding in the way they got their loan, who legally collateralized their loan. The fact that they lost interest—I mean, the bank lost the advantage of having the interest—means that the bank was deprived of the opportunity to make other loans to other investors.

Conaboy: Wouldn't all those things be—when you use the term "harm," aren't we always talking about all those things? Harm doesn't necessarily mean harm to a particular victim. Harm could be harm to society

Rosen: That's the point I'm making.

Conaboy: So that harm would, in my judgment, include all of us. Professor, you've been trying to get a word in here, and I don't want to . . .

Bowman: Two sides of the same point. I don't disagree with the judge at all that in some measure we are trying to decide what the harm to society is. The problem you have, though, is that we have a guideline system which is based on a numerical standard. You can't simply say the words to someone, "There is a harm to society." You have to pick a number under the system that we have, a loss number, and put it into a table. And that means you have to decide how to calculate the number. We can't escape that. And therefore you have to decide to whom the loss occurs in order to do the math. It's inevitable. No matter how you dance around it, you have to say who's suffered a dollar loss here, if we're going to do the math. You can't just say "society," because the math becomes impossible.

The second point then, I think—which is related to that—is the question that I think you properly focused on, Judge Tacha, and that is the defendant's culpability. How does this loss notion interact with the idea of the defendant's culpability? And the key is foreseeability. That's where the two things interact and intersect. The reason why foreseeability is useful—the reason

why, as I suggest, I think judges do this all the time, even if they don't use the word—is because it is fair to sentence defendants based not only on the harms that they desire—which is certainly, you know, that's rock bottom. Beyond that, it is fair and appropriate and just to sentence them based on the harms that are foreseeable to them, even if those harms exceed the ones that they specifically desire. That's why, I think, to this extent Jim Felman is absolutely right, that if you adopt a cause-based—by which I mean cause-in-fact plus foreseeability-based—system, you are going to some degree, *expand*—not contract—you will *expand* the number of harms you're going to bring into the loss measurement. And you will do so, in my view, in a way which takes account of the defendant's culpability, because it insists that the harm be one that is foreseeable to him.

Conaboy: Let me move to the third section, because I think all of you have done that already—any other questions?

Goldsmith: Yes, I had a question for Jim Felman and also for Judge Rosen. Jim, you had mentioned a moment ago that you preferred a "net" rather than a "gross" approach. And I need to ask a very narrow question: net as of when? As of the time the crime was committed, at the time it was detected, at the time of sentencing?

Jim Felman: I think that you don't have to—I mean "net" is—there are two parts to that question. First, you have to decide the loss, then you have decide the credits to put against the loss in order to arrive at the "net." And I don't think you have to value both of them at the same time necessarily. As far as the credits, it seems to me that the value of the credits ought to be at the time that the collateral is posted. That to me tells the most about what the defendant is intending. So I would value the credits at the time they are provided. If they go up in value or down in value after that point, that doesn't capture to me the defendant's culpability.

Goldsmith: What about payments made on the loan, for example?

Jim Felman: They would be valued as of the time the payment is made, which I don't think is hard. I would include, in other words, as in my "net" approach, as a set-off to the ultimate loss, the payments made to pay the loan back.

Tacha: Until when?

Jim Felman: I would cut it off at the point of detection. I can't possibly support an argument that after I have been charged I can keep paying it back. I've tried, but I can't do it.

Conaboy: Judge Rosen, do you want to comment on that?

Rosen: Your question raises the point that I wanted to make anyway, which was the "net" approach really doesn't work very well in a lot of situations. It works well when you are talking about a guy who walks into a bank and sticks up the bank and walks out with X number of dollars, that works fine. It doesn't work very well in a lot of the fraud contexts that we see it.

For example, in the Ponzi scheme, it doesn't work very well. I've had this, unfortunately, in a number of different cases. What happens when, in a major Ponzi scheme, you get a guy who is caught relatively early in the process where there hasn't been a lot of actual loss to victims? In other words, the victims have been paid back in order to perpetrate and perpetuate the crime. The heart of the Ponzi scheme is to pay back some people early so that you can either get some more money from them later or use them to bring in other investments. That's the heart of the crime. It is simply fortuitous that maybe the actual loss was only $5,000 or $10,000 or $15,000. The "net" loss concept does not capture that at all. And as I said, sentencing—one major factor in sentencing which Judge Tacha has alluded to is deterrence, and focusing on culpability of the person. So you have to, I believe, in establishing a sentencing regime—you have to take into account those situations in which the criminal intended to use the loss aspects and their repayments to perpetuate the crime further. And that really is at the heart of a lot of the fraud schemes that we see in the federal courts.

Conaboy: I was trying to conclude our session by 12:30 and we're getting near that time. We've gone over a little bit, if we were to divide these things up into three categories. But actually what we've done is melted these together, and all of you have been talking a little bit about the last area, and that is the specific problems, such as interest and consequential damages and diversion. Frank, let me start in your end at this time. Do you want to comment any further on those, the need to have any clarification of a general principle on matters like using gain where there is maybe no loss discernable?

Goldsmith: Frank, before you do, if I could provide a further context for you. To the degree that you can, if you think that these are matters that the Commission ought to address, and you think that your foreseeability approach helps resolve the issue, if you could give us examples—how it does so and what the outcome would be—that would be helpful. In, of course, fewer than three or four minutes.

Bowman: Hard to do. Well, let's talk about the whole business of consequential damages. The first thing is that a harm-based definition just eliminates that whole silliness. The whole idea of consequential damages has no place in these guidelines. Consequential damages is a contract term. So is direct damages. It has *no meaning* in the criminal law. And therefore, it is not surprising that courts can't figure out what it means.

Rosen: Unless you are the one whose money has been taken.

Bowman: Well, it has a sort of a metaphorical meaning. It has no legal meaning that's applicable. Consequential damages are—is a phrase that's drawn from contract law, which is designed for a context in which there's a contract, there's a specific promise that's broken, and there are damages that flow from that.

Goldsmith: Why is that a problem? I don't understand why the fact that consequential damages ordinarily apply in a civil context—why they couldn't apply in this context as well. I

think Judge Rosen is correct. From the standpoint of the victim, oftentimes, the victim incurs very real expenses.

Bowman: No, no, no, I am not making myself clear. The *kinds* of things that would be included in a civil case in consequential damages—

Goldsmith: —would fall within—

Bowman: —would, if foreseeable, fall within the definition I am suggesting.

Goldsmith: We just don't need to use the term.

Conaboy: You are talking about the concept of harm and foreseeability having within them consequential damages. I follow you.

Bowman: If you look at contract law—God help us, consequential damages, just to figure out what that means, you have to go read *Hadley v. Baxendale.* I mean, I didn't read it the first time. And I didn't understand what I read. If you read, if you go back and you look and you try to figure out what this stuff means, in contract law, consequential damages, those which are recoverable, are those which flow directly from the breach of the promise, and which are foreseeable to the defendant. And so essentially what you have right now is a disguised rule causation. You see, you have in the guidelines right now a disguised rule of causation. It's just that you don't know you have it, perhaps. By using this consequential/direct language, you built into the guidelines an *exclusion* of foreseeable damages for all cases, except for product substitution and procurement cases.

Goldsmith: The concern I have is that if you eliminate the term "consequential damages" from the guidelines, people reading the guidelines will then come up with the negative implication argument that the exclusion of the term means that there is no longer something to be considered.

Bowman: Well, I suppose that you—

Tacha: Only pointy-headed academics and appellate judges.

Felman: And defense lawyers.

Conaboy: Well, its a basic theory of any law that we have, civil or criminal law, that you shouldn't be punished for harm you do not cause. The concept of punishment has to be based upon harm. If you cause no harm, then you shouldn't be punished. Now, that allows, of course, for a fairly broad definition of harm. As somebody here has said, we have always talked about victimless crimes and we always talk about matters where no specific victim was harmed, but there is such a thing as harm to society. Drug use, for instance, is one of those areas where you may even want to say that there is no specific harm done with your typical, specific victim. So

throughout all of what we're saying here today, it seems to me, we are talking some very basic, *old* concepts of law: harm, causation, foreseeability. These are all things that have led us, in this country, in our form of law, to be able to resolve issues between parties, by looking at different fact situations, but using those core concepts to see whether or not you can put blame, either civil or criminal, on any specific party.

Bowman: Judge, I couldn't put it better myself. And that's exactly the core of what I am trying to say in 146 long pages.

Conaboy: The problem, though, what seems to happen—and it happens to us, by the way, as a Commission—I would suppose it would happen to any group of human beings—is that when we get a core definition, somebody always says, "Yeah, but how about this case?" Shouldn't we be able to tell you what consequential damages are? Shouldn't we have a definition for interest? Shouldn't we have a definition for gain? Shouldn't we have a definition for loss? And what are you getting when you do all that? You are getting the United States Sentencing Guidelines. One definition after the other, after the other, in an effort to make sure that no judge or no court can ever deviate from that *one* concept. It seems to me that that seems to be underlying what we're saying here today, and we have to make some choice, it seems to me, as to whether or not we're going to let a court system work. A court system, in its essence, seems to me, to be a system based upon a concept that you let the people who man that court make decisions that they think are responsible on the basis of the fact situation they're presented with. It doesn't mean that everyone is going to be the same, I don't think. That's never been in the law of our country before, but it is now—it seems to get hardened into what we talk about. Judge Rosen?

Goldsmith: Let me pose this question to Judge Rosen because I think it responds or suggests in part my response to your comments, Chairman Conaboy. There is of course a question here about how much—how these rules are to be framed in terms of the amount of discretion to be conferred upon the judges, in making this determination. And it strikes me that in the past few years, in working with the Criminal Law Committee, oftentimes the request of the committee members has been to find ways to give judges more discretion. And we've worked with the committee in a variety of ways to accomplish that. We have listened to their criticisms of the guidelines insofar as inadequate discretion was conferred upon the judges. This time, the statement being advanced by the Criminal Law Committee seems to be not a call for discretion, but, jot for jot, every issue that we asked you to address, you have asked us to provide specific rules. So it strikes me as quite different from the scenario that has occurred in the past. And that suggests to me, Judge Conaboy, that what the judges nationwide are looking for here is not necessarily more discretion, but more guidance.

Conaboy: I take it you would make a very good case of that.

Rosen: Your point, Mike, is a good one, and I think it depends in which area of the law you are talking about. In the area of the drug law, I think many of us feel very constrained by the

guidelines, but the nature of that constraint and the nature of our discomfort a lot of times is sometimes basic unfairness in the way those constraints operate. In the area of the loss, we feel that, speaking for myself and I think a number of other members, the basic problem is that economic crime is underpunished under the guidelines, particularly in juxtaposition against drug crimes and gun crimes. And as a result of that, I think the judges are looking for more direction from the Commission to kind of beef-up both the tables and the definitions to provide more structure to the loss definition. I think that's the short answer. If you want me to speak as a judge, purely as a judge, yeah, it's always nice to have discretion, but that doesn't really promote the objective of the guidelines in the sentencing guidelines act at the beginning, which was to promote uniformity and reduce disparity. My suggestion, coming back to the Chairman's first question, my suggestion—and I think I speak for the Committee on that—is that with respect to these specific loss-related issues, I think judges are looking for more definitional help from the Commission, a little more undergirding that we could resort to.

But, at least speaking for myself, I would be happy if those were viewed as mitigation issues. Using the kinds of examples that Jim Felman has used, I would certainly take those into account, if in fact the person realized out of his crime only $100,000—I say only—if he realized out of his crime $100,000 and he was arguably being held for a $1,000,000 scheme, I would certainly take into account, as a mitigating factor, the fact that he only realized $100,000. But the core definitional approach should anticipate that he is really going to be held for $1,000,000. Same thing on interest, as Judge Tacha raised. The same thing on an issue like gain. The fact that his gain was little bit less and his loss was maybe greater—these are mitigation standards.

Goldsmith: But in the $1,000,000 example, if it is collateralized to the tune of $900,000 at the time of the initial loan, then the bank is really only at risk for a hundred thousand. So you wouldn't—

Rosen: But society is at risk for more.

Goldsmith: Is it? How is that? I mean, if it's—

Rosen: Because banks are going to be, in the economic reality of the world—and I used to represent banks—when you have fraudulent loans, they're going to be—

Goldsmith: You were a criminal defense lawyer?

Rosen: Civil.

Goldsmith: Just kidding.

Conaboy: That's why he can see the harm.

Rosen: But in a societal context, the more fraud you have, the more cautious banks are

going to be about making loans, and the more rigid their guidelines are going to be for other possible borrowers, and therefore the less money is going to be available for honest borrowers.

Conaboy: You talk about consequential damages—that's about as consequential as you get.

Rosen: I'm talking about consequential *effects to society*.

Conaboy: Yes, that's what I mean. That's really carrying it out. Well, let's see . . . we really truly appreciate your coming here. This is a very interesting and illuminating discussion and I think it will be helpful to us in many ways. I say "think" because the longer you're in this business of trying to make up the rules after you listen to anybody, the harder it is to decide, "Is there a rule that will satisfy everybody?" But, before I close, let me ask the commissioners—Judge Tacha, do you have anything?

Tacha: I just have an invitation. You have all said let's get a new definition, you have all said this is a problem. If you can draft two or three sentences you think would be the right definition, send it to us.

Conaboy: It would be helpful.

Bowman: You've got mine, judge.

Tacha: I know I have yours, Frank.

Felman: I'll see if I can do that on the plane home.

Tacha: All right, thanks. And I would be interested—I mean, I don't want big long things—how does it fall as to interest, gain, if that is your definition.

Gelacak: I hate to ask this question, but it seems to me everybody is in agreement, and I think everyone in the Commission is in agreement, that the definition or the term or the area of loss is a problem. And it's one that we may or may not be able to solve. But it also seems to me that we are talking about two different things, because I've heard certain members of the panel say that we should not join the issue of trying to solve the problems with the definition of loss with the changes to the table. But if the definition is a problem, isn't, by definition, the table a problem? It seems to me what we are trying to say is "We know we have a problem, we don't know how to fix it, so let's increase penalties." That's always been a problem for me, and it's not going away. The answer to this problem is not simply to up the amount of time people go to jail for creating a circumstance that we can't even *define*, and we admit we can't define, and we're unhappy with.

So it's very hard for me to get from one place to the other without tackling the definition.

I have no way to get from concerns over the definitions to, "Oh, let's just increase penalties and maybe that will solve the problem." It will—if we just say that everybody who commits a fraud goes to jail for life, we've got the problem solved and we don't have to worry about the definition. But it's going to be hard to drag me along in that direction. And we *have* a table. If we were starting from scratch, I'd agree with you, Judge Rosen, we ought to probably have a table before we go anyplace else. But we *have* a table, and simply saying we are going to increase the table is saying nothing more to me than, "Let's increase penalties." That ultimately may be what we want to do, but if we are going to increase those penalties, we certainly ought to be concerned about what we are increasing them for. And if we don't like the definition, and we don't agree with the definition—we all recognize that it is a problem—I don't see how we can *do* one without the other. I can't. So, how do we get from one place to the other?

Bowman: Commissioner, if I can respond to that. The last time I was here, I sort of stuck my oar in from the back of the room and suggested—and agreed I think with Jim Felman and others from the practitioners' group—that it seemed to me then that you ought to be reluctant to go forward with raising a table until you address the loss definition. But I've been thinking about that since then, and I suppose my position is a little refined since then. Let me see if I can explain.

I think I agree with Judge Rosen that *analytically* there is no major problem with going ahead with the loss table increase separate from the loss definition. I think they are separate questions. The reason I express some hesitation about going forward is—I suppose the bluntest way of characterizing it is a political one. What I am concerned about—let me back up a second. On the one hand, I am in favor of increasing economic crime penalties, generally, and I argued about it in publications and so forth. I think economic crime penalties are too low, absolutely, and I think they are certainly too low vis-a-vis drug penalties. Therefore in my own personal view, I think we should increase them at least somewhat.

The reason that I am concerned about doing the two things separately is that I think you have a *separate* problem, a separate . . . [gap in recording] . . . as long as there is a commitment on the part of the Commission and the rest of the participants in the system to move to the technical problem, to solve the day-to-day problem that this definitional confusion creates for judges and for litigants, I don't see any *logical* problem whatsoever in proceeding now to increasing the tables, because I think they are logically separate issues. Now, again, one can have different positions about whether or not you *should* increase the tables. I think that's a different question. But I think that the two questions can be logically separated and treated separately as long as there is that commitment to move to the second step.

Gelacak: They are logically separate, even in mind, but the logic doesn't compel treating them as independent concerns. The fact that the table can be increased *or decreased* shouldn't make any difference if there is a legitimate way that people are being placed against that table. But if the way they're being placed against the table is not legitimate, is not satisfactory, and does not come to everybody's perceived conclusion, then what difference does it make? It makes no

difference what the table is, if we're unhappy, if we're placing the people against it in the wrong positions, or they get into the wrong positions.

Rosen: You can solve that problem separately.

Gelacak: Of course you can, but—

Goldsmith: The problem here is not necessarily (excuse me, Mary) that the tables are unfair—rather, that the definitions are unfair. The problem is that they're complicated, and consequently if we deal with the complicated issues and refine the definition so that it's easier to apply, we improve the definition overall. I'm not hearing a hue and cry that the definition of loss is *unfair*—

Rosen: It's unworkable.

Goldsmith: —in the way that we've heard about crack cocaine, for example. I'm hearing it's *unworkable*. So what we're trying to do is respond to that and remedy the problem, but if it were a question of fairness, I would feel differently about it.

Conaboy: All right, any questions or comments?

Harkenrider: Well, I'm not even sure I'm hearing that it's unworkable. What I'm hearing, I think from everybody—perhaps with Frank aside, but he's a *professor*—is that it needs some slight changes. I mean, we need some slight refinements. We're not talking big ticket items. We're talking, I think, that Jim and Judge Rosen aren't all that far apart, in terms of what they are talking about, and the probation officers that said we basically can deal with it now. Sure there are some things that we can fix, and perhaps being more specific in what the philosophical underpinning is would help in fixing those issues. I don't think anybody here is saying, quite frankly, that it's *unworkable* and that it is something that absolutely isn't working now. We're saying that there are some places—

Rosen: Unworkable maybe analytically. It's difficult, I guess—

Harkenrider: It could be made a little bit easier, and I think the figures bear that out, as Judge Tacha suggested.

Conaboy: Well, I think what we've talked about—thank you very much—is that we make these things work. We have to. If we give you a mixed-up definition as a Commission, you're going to have to make it work in the field. And I think that what people like Gregory are saying is that these cases work themselves out, somehow. That's because, not so much that the definition we have is good, or the direction you have from us is good, but it's because people of good will get together and they try to resolve a case. You don't only have the guidelines to work with, when there is a case before you. You have a real live case, with the government prosecuting

a specific individual, and you've got to get it done. And that's usually what happens: they get together and they sit down and say, "What do you think loss is, and what do you think it is?" And somehow or other, remarkably in our system, they are able to work those things out for the most part.

Well, we thank you again. This is, as you can see—I endorse Judge Tacha's request to you, by the way, very seriously. It would help to, if you feel so inclined, to submit what you think might be a reasonable or workable definition. But thank you again for coming.